Filed 8/3/09 P. v. Simes CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MELTROVAE SIMES,

Defendant and Appellant.

F055181

(Super. Ct. No. DF008077A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. L. Bryce Chase, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Jennevee H. De Guzman, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Meltrovae Simes, a state prison inmate, was convicted by a jury of possession of a weapon while confined in a penal institution (Pen. Code[1], § 4502, subd. (a)). He admitted the special allegation that he suffered one prior strike conviction (§ 1170.12), and was sentenced to the second strike upper term of eight years.

On appeal, he contends the trial court improperly denied his pretrial motion for disclosure of law enforcement personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); the court should have excluded or "sanitized" his prior conviction for armed robbery for purposes of impeaching his trial testimony; and the imposition of the upper term violated *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). We will affirm.

FACTS

Correctional Officers Brian Hancock and Michael Morales were assigned to the Investigative Service Unit (ISU) at Kern Valley State Prison in Delano. ISU officers investigate crimes committed within the prison and wear distinctive patches on their uniforms. Appellant was an inmate at the prison, assigned the task of an assistance giver/porter, and he was outside of his cell more often than other inmates as he cleaned the tier and assisted infirm prisoners.

Around 3:50 p.m. on June 28, 2006, Officers Hancock and Morales and four other ISU officers entered the section where appellant was housed, to search an inmate's cell on a matter unrelated to appellant. The officers testified that appellant was outside of his cell and sitting at a dayroom table. There were no other inmates in the dayroom. As soon as the officers entered the section, appellant looked toward them and jumped up from the table "pretty quickly," moved up the stairs "real fast" to the upper cell tier, and

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1 All further statutory citations are to the Penal Code unless otherwise indicated.

walked to his cell at a very rapid pace. Appellant stood in front of the closed door to his second tier cell, waived his arms to get the attention of the control booth officer, and indicated he wanted to get back into his cell.

The officers had no prior contacts with appellant, but they believed his behavior was suspicious and unusual because of how quickly he moved from the dayroom table to his cell. Officer Hancock[2] ordered appellant to walk down the stairs and return to the dayroom, and appellant complied. Hancock stood behind appellant and conducted a clothed-body patdown search. Officer Morales stood in front of appellant as Hancock searched him. The other four ISU officers continued with their unrelated investigation.

As Hancock patted down appellant's waist area, he felt something hard and abnormal just below the elastic waistband of appellant's grey sweat shorts. Hancock placed appellant in handcuffs and removed appellant's shorts. Hancock examined the shorts and found a pocket which had been sewn into the inner waistband, a modification to personal clothing which was against prison rules. The pocket contained an inmate-manufactured black plastic stabbing weapon, with a sharpened end and a rubber band to help grip the object. Hancock testified that inmates manufacture such weapons by melting down plastic shampoo bottles and sharpening the point on the concrete cell wall, and use the objects to attack other inmates. Appellant's pocket also contained an inmate-manufactured heating element, used to heat water and light cigarettes; it was not the type used to melt plastic bottles. Both objects were contraband under prison rules.

Hancock and Morales escorted appellant to the first tier shower stall, conducted an unclothed-body search, and did not find additional contraband. The officers searched appellant's second tier cell and found black scrape marks on the upper bunk wall, consistent with sharpening a weapon against the wall's hard surface. A few hours after

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2 As we will discuss in issue I, *post*, appellant moved for disclosure of Hancock's personnel records pursuant to *Pitchess*; the motion was denied for failing to state good cause.

appellant was searched, the officers photographed the contraband in the ISU office and placed the items into sealed envelopes.

Dan Peters, an ISU officer at the same prison, testified as an expert on inmate-manufactured weapons. Peters testified it was significant that appellant was employed as an assistance giver/porter, because an inmate with that job assignment is outside of his cell more often to work around the unit, he may not be searched as frequently, and he will typically keep contraband on his person rather than leave it inside his cell.

Defense evidence

Appellant testified and admitted he was convicted of armed robbery with the personal use of a handgun in 2003. Appellant offered his version of the events of June 28, 2006, which was vastly different than the officers's testimony. Appellant testified that just before the ISU officers entered the section, appellant was standing in front of a first tier cell and talking to the inmates inside. Several other porters were also in the dayroom.

Appellant testified that seven members of the ISU "goon squad" arrived in the section. The ISU sergeant ordered appellant to step away from the cell and walk backwards to the dayroom tables. Appellant complied, backed up, and stood next to another porter as the ISU officers directed their attention to a first tier cell.

Appellant asked the control officer if he could take his shower, and the officer said he was clear to take his shower. Appellant walked past the ISU officers, went upstairs to the upper cell tier, stood in front of his cell, and told his cellmate that the "goon squad" was in their section. His cellmate told him that the officers were trying to get his attention. Appellant turned around, and the sergeant and two officers asked him to return downstairs. Appellant went downstairs to the dayroom and sat down with two other porters.

The sergeant told appellant he was subject to a random search because they were trying to get control of all the inmates in the section. Officer Hancock conducted the

clothed-body search and Officer Morales watched. Hancock searched his waistband and then ordered appellant to sit down. Morales stared at appellant's crotch area, told him to remain standing, and asked what was in the front of his shorts. Appellant thought Morales was making a sexual remark and gave a "smart nose" reply that Morales did not like. Appellant told the officers he had a pocket which contained a special pen and a lighter. Appellant reached inside his shorts for the items, but Hancock told him not to move and "slammed" him against the table, and Morales removed his shorts and took items from his pocket.

Appellant testified that another inmate made the pocket for him over two years earlier, when he was in another prison, and appellant used it to store his glasses and identification when he played basketball in the yard. Appellant testified he did not possess the sharpened stabbing weapon with the rubber band handle which Hancock testified to and displayed at trial. Appellant testified he only possessed a heating element and a modified plastic Bic pen, and Morales removed those items from his pocket.[3] Appellant testified that just before the ISU officers entered the section, he was talking to "Joker," and Joker gave him the heating element and Bic pen. The Bic pen had been melted and modified with a paper clip at the tip, and Joker gave it to appellant so he could use it for a particular drawing technique.

Appellant testified Officer Morales removed the heating element and pen from his pocket, and said the pen could be used as a weapon. Appellant was angry about being "slammed" against the table, told the officers that the pen was not a weapon, and said "things I shouldn't have said at this time." Two other officers asked appellant for his cell number, he was escorted to the shower area, and Morales conducted an unclothed-body search.

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3 As we will also discuss in issue I, *post*, appellant's pretrial *Pitchess* motion asserted that he did not have anything in his pocket when the officers searched him.

Appellant testified that as he was searched in the first floor shower area, he could see other officers in his upper tier cell, by looking at the reflection from the control booth windows, and they were searching his cell. Morales completed the body search and joined Hancock in appellant's cell. Appellant testified he could see the officers take photographs of the heating element, the pen, and his cell. At trial, appellant was shown photographs of his cell which depicted the scrape marks on the wall. Appellant disputed the origin of the scrape marks, and said the wall was not a good location to sharpen an object because the control booth officer could see that wall from his tower.

After the search, appellant was taken to the administrative segregation unit. Appellant testified that on June 29, 2006, the day after he was searched, an officer removed him from his administrative segregation cell and took him to a conference room. Morales and Hancock arrived, escorted appellant to a car, and drove him to the prison's ISU office. Morales took appellant into an office and Hancock waited outside. Morales placed a tape recorder on the table, and asked appellant if he was aware of any illicit activity in the yard, such as drug smuggling or attempted assaults. Appellant said "maybe." Morales said that if appellant helped them with information from the yard, then the previous day's incident would not be sent to the district attorney's office for prosecution. Appellant got upset and thought Morales was blackmailing him, and he said no one would charge him for carrying the Bic pen as a weapon. Appellant did not give them any information, and Hancock and Morales did not show him the items they removed from his pocket.

Appellant testified that a few weeks later, he was still in administrative segregation and spoke to Officer John Hart, who was acting as his investigative employee for the administrative violation hearing based on this incident. Appellant told Hart that he could not understand why he was being charged with carrying a weapon. Hart showed him a photograph of the items recovered from the pocket of his shorts – the heating element, and the melted and sharpened weapon with the rubber band. Appellant testified

he had never seen the sharpened instrument with the rubber band until Hart showed him the photograph.

Appellant testified about another meeting with Hart, while he was still in administrative segregation, when he told Hart that the "goon squad" fabricated the pictures. Hart asked appellant if he would feel more comfortable giving information to him, since appellant did not want to give information to the "goon squad." Appellant agreed to tell Hart about drug smuggling because he felt more comfortable talking to him.

Appellant testified he had no reason to possess a weapon because he did not have any enemies in the prison, and he was not affiliated with or a member of any gangs. Appellant testified he never told anyone that inmates owed him money and wanted to shank or kill him, and never said he was trying to get into the prison's Substance Abuse Program (SAP) to avoid being in the cell tier section. On cross-examination, appellant was asked what were the "P's and B's." Appellant said the phrase referred to the Piru and Blood gangs.

Also on cross-examination, appellant admitted he was given a written lock-up order when he was placed in administrative segregation after the search, he read it the next day, and the order stated that he was found in possession of a black plastic weapon, sharpened to a point, approximately four inches long. Appellant thought the weapon was the modified Bic pen. Appellant also conceded that when he spoke to Hart about the incident, he did not tell him about being slammed on the dayroom table by Hancock.

The defense recalled Hancock and Morales, and they both denied making any offers for appellant to provide information in exchange for dropping the case against him, and Hancock denied using any physical force against appellant.

Rebuttal

Hancock testified that it was not possible to see appellant's second tier cell from the first tier shower area, even by looking at the reflection in the control tower's windows. Hancock produced prison records which showed appellant was in

administrative segregation on June 29, 2006, the day after the search, and he was removed from his cell by Captain Fisher at 12:30 p.m. and interviewed about his administrative violation. According to the records, appellant was not otherwise removed from that unit or taken to another part of the prison, and the documents would have recorded such an event.

Morales testified that after appellant was searched, Morales seized appellant's shorts, the heating element, and the sharpened object, he photographed the items with a digital camera, he did not delete any of the photographs, he sealed the items in evidence bags, and the bags remained sealed until the instant trial.

Officer Hart testified he never interviewed appellant, they never discussed any illicit activities at the prison, and appellant never gave him such information.

Appellant's telephone call

Appellant was taken to administrative segregation on the day of the search, and remained there until December 2006. Appellant was again placed in administrative segregation on May 8, 2007. On the evening of May 17, 2007, appellant was back in the regular cell tier and called his brother. The call was recorded and the recording was played for the jury.

Appellant told his brother that he just got out of the "hole," and "some niggas" were supposed to stab him when they were released from lock down. Appellant said "these niggas" owed him money, they couldn't pay him, and "they thought they'd get rid of me." Appellant said one of "the homies" found out, dropped "a kite," and "got me off the yard."[4]

Appellant's brother asked if there was anything he could do to get appellant out of the facility. Appellant said he was trying to "get into the SAP Program which is all these

[4] Officer Hancock explained "homie" is a slang term used by gang members to refer to each other, and a "kite" is a small piece of paper used by inmates to pass along confidential messages.

little base heads and shit." His brother was worried they could try it again. Appellant replied:

> "[N]aw but if it, dude see I'm on my p's and b's if they do right, between me and you man either I'm gonna go to the SAP program but if word get about that, they gonna come to me about some shit right, but I'm not in (inaudible) though, I ain't got nothing to worry about, so if something was, lets say these niggas but dirt on my name, (inaudible) some niggas don't believe me you feel me, then I'll go to the PC yard."

Appellant's brother asked whether "Poe" was involved and appellant said no.

Appellant testified in surrebuttal and tried to explain some of the statements he made to his brother during this telephone call. Just before he made the call, he had been in administrative segregation because he gave information to the correctional officers about racial tensions between the inmates. When he told his brother about his fear of being stabbed, he was referring to general racial tensions at the prison. Appellant testified other inmates knew he gave information to the correctional officers, and the officers warned him that his life was in danger. Appellant could not tell the truth to his brother during the telephone call because other inmates were around the area, and he lied about the inmates owing money to him.

Appellant testified a "kite" was a letter written by an inmate to someone on the outside, or information provided by an inmate to a correctional officer Appellant testified he never tried to enter the prison's SAP because he knew he did not qualify. Appellant said his brother's references to gang terms were actually to "Swahili" words.

Appellant was asked what he meant by "P's and B's," since he previously testified the initials meant the prison gangs of "Pirus and Bloods." Appellant testified:

> "[I]t's not prison terms but everybody else or certain people know what I'm talking about, it's position and boundaries. P stands for proper planning, preventing poor performance. B, when I was telling my brother beautifully bold, brilliantly black."

Appellant was asked to explain his earlier testimony that he did not have any enemies in prison. Appellant meant that he did not have any enemies where he was currently housed.

DISCUSSION

I. The court properly denied appellant's *Pitchess* motion.

Appellant contends the court abused its discretion when it denied his pretrial *Pitchess* motion for disclosure of Officer Hancock's personnel records, and refused to conduct an in camera review of the records. Appellant asserts the motion set forth sufficient good cause for disclosure and requests this court to conduct the in camera review.

A. Background.

Appellant filed a pretrial *Pitchess* motion for disclosure of Hancock's personnel records, and for the court to conduct an in camera review of the records to determine disclosure of "complaints relating to dishonesty." The motion was supported by Hancock's report about the incident, which is consistent with his trial testimony as set forth ante.

Defense counsel submitted a declaration in support of the motion, and asserted there was good cause for disclosure of Hancock's personnel records for the following reasons:

> "That according to Correctional Officer Hancock's report, Officer Hancock noticed [appellant] sitting at one of the day room tables. [Appellant] noticed ISU staff entering into the day room and quickly stood up, proceeded to walk at a brisk pace to the stairs and up to his cell. [Appellant] was trying to get the control booth officer's attention. Officer Hancock ordered [appellant] to come back down to the day room and have a seat at the table. Once [appellant] was downstairs, Officer Hancock performed a clothed-body search of [appellant]. During the search, Officer Hancock discovered concealed contraband inside [appellant's] shorts above his genitals. Officer Hancock removed the shorts and discovered a plastic stabbing weapon and an inmate-made heating element.

> "That I have been informed and I believe to be true that [Officer Hancock] did not find a stabbing weapon nor an inmate-made heating element. [Appellant] simply had a pocket inside of his boxers.
>
> "The instant motion is brought pursuant to Evidence Code section 1043. I am informed and believe that there have been complaints filed with the California Department of Corrections and Rehabilitation that allege acts indicating, or instances of, dishonesty regarding officers, and that records of such complaints exist. Discovery of such records would be used to locate witnesses to testify that the officer has character traits, habits, and customs to engage in the specified misconduct. Such testimony would help establish the officer engaged in such dishonesty in this case. The discovery would also be used to cross-examine the officer and to impeach. I am informed and believe, and thereon allege, that said records are presently within the custody of [CDCR]."

The prosecutor's opposition argued appellant failed to establish good cause for an in camera review of Hancock's personnel records because appellant "simply dispute[d]" possessing the contraband "without setting forth an alternative plausible scenario that is credible." The prosecutor further argued that defense counsel's affidavit failed to state a logical connection between the charges and any type of proposed defense, "bald assertions" of misconduct were insufficient, and defendant was required to provide an alternate version of events that was plausible, even if not entirely convincing. The prosecutor argued the court should summarily deny the motion because of these defects.

At the hearing on the *Pitchess* motion, the deputy attorney general appeared as the custodian of records and argued appellant failed to provide an alternative factual scenario to establish good cause for disclosure of Hancock's personnel records. Defense counsel replied the motion and declaration were sufficient for the court to conduct an in camera review based on the allegations that "none of those items of contraband, the weapon, nor the heating element were located inside of [appellant's] boxers." (*Id.* at p. 7.)[5]

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5 Appellant's *Pitchess* motion asserted that he did not possess either the stabbing instrument or the heating element, and nothing was in the concealed pocket. At trial, appellant admitted the heating element and modified Bic pen were in the concealed pocket but insisted he did not possess the stabbing instrument.

The court denied appellant's *Pitchess* motion and found that simply accusing an officer of not telling the truth was insufficient to meet *Pitchess*'s requirement of good cause. "The good cause appears to be simply an averment in your declaration that based on some information that you have that I'm not privy to, you believe that Officer Hancock did not find a stabbing weapon." (*Id.* at pp. 8-9.) Defense counsel agreed with the court's characterization of the motion and declaration. (*Id.* at p. 9.) The court replied: "[T]hat doesn't give the Court any way of evaluating what that good cause is, other than your simply averment of it. So I'm going to deny the request for *Pitchess*." (*Ibid.*)[6]

B. Analysis.

The California Supreme Court has "recognized that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219 (*Mooc*).)[7] The *Pitchess* discovery procedure has two steps. First, the party must file a written motion describing the type of records sought, supported by "[a]ffidavits showing *good cause* for the discovery or disclosure sought, *setting forth the materiality thereof to the subject matter involved in the pending litigation* and stating upon reasonable belief that the governmental agency identified has the records or information from the records." (Evid.Code, § 1043, subd. (b)(3), italics added; *Mooc, supra,* 26 Cal.4th at p. 1226.)

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6 This court subsequently ordered the superior court to prepare a settled statement as to the *Pitchess* hearing of December 10, 2007, and transmit Officer Hancock's sealed personnel records to this court. At the hearing on the settled statement, the superior court stated that it denied appellant's *Pitchess* motion because the supporting declaration was insufficient to meet the threshold for in camera review, and an in camera review was not conducted. The court also accepted Hancock's sealed personnel records and transmitted them to this court.

7 The procedure for *Pitchess* motions was codified by the California Legislature in 1978 through the enactment of sections 832 .7 and 832.8, and Evidence Code sections 1043 through 1045. (*Mooc, supra,* 26 Cal.4th at p. 1220.)

"This good cause showing is a 'relatively low threshold for discovery.' [Citation.]" (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70.) Assertions in the affidavits "may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information [citation]." (*Mooc, supra,* 26 Cal.4th at p. 1226.) As such, "a declaration by counsel on information and belief is sufficient to state facts to satisfy the 'materiality' component of that section. [Citation.]" (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 51.)

> "Although the standard of good cause has a '"relatively low threshold"' [citation], the materiality element nonetheless requires a specific showing that there is 'a logical link between the defense proposed and the pending charge,' and an explanation of 'how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' [Citation.] The showing of materiality must also include presentation of a '"plausible factual foundation"' for the proposed defense, that is, 'a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents' [citation]; 'one that might or could have occurred ... because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial.' [Citation.]" (*Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1111-1112 (*Hurd*), citing *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*).)

"Depending on the circumstances of the case, the denial of facts described in the police report may establish a plausible factual foundation. [Citation.] A factual scenario does not have to be reasonably probable or credible. 'To require a criminal defendant to present a *credible* or *believable* factual account of, or a motive for, police misconduct suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not.' [Citation.]" (*People v. Thompson* (2006) 141 Cal.App.4th 1312,

1316-1317 (*Thompson*), italics in original, citing *Warrick, supra,* 35 Cal.4th at pp. 1024-1026.)

The second step in a *Pitchess* motion occurs if the trial court finds good cause for discovery of personnel records. Thereafter, the court conducts an in camera review of the pertinent documents to determine which, if any, are relevant to the case, typically disclosing only identifying information concerning those who filed complaints against the officers. (*Warrick, supra,* 35 Cal.4th at p. 1019; *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 414.)

Absent a showing of good cause, an officer's personnel records are not relevant to any issue in the case. (*People v. Collins* (2004) 115 Cal.App.4th 137, 151.) Even upon a showing of good cause, the defendant is only entitled to information that the court, after the in camera review, concludes is relevant to the case. (*People v. Johnson* (2004) 118 Cal.App.4th 292, 300.) The trial court has broad discretion in ruling on both the good cause and disclosure components of a *Pitchess* motion and its ruling will not be disturbed absent an abuse of that discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.)

In *Warrick,* the court held the defendant showed good cause and offered a plausible factual scenario for an in camera review of personnel records. In that case, the police report stated that officers saw the defendant holding a baggie of rock cocaine in an area known for narcotics activity. When he saw the police, the defendant fled and discarded numerous rocks of cocaine, and an officer recovered 42 rocks. (*Warrick, supra,* 35 Cal.4th at pp. 1016-1017.) The defendant denied possessing or discarding the rock cocaine. Defense counsel's declaration in support of the *Pitchess* motion stated that defendant was in the area to buy cocaine, he ran from the police because of an outstanding warrant, other people were pushing and shoving each other to retrieve rocks from the ground, an officer claimed defendant "'"must have thrown"'" at least some of

rocks, and the officers falsely asserted that defendant discarded the cocaine as he ran. (*Warrick, supra,* 35 Cal.4th at p. 1017.)

Warrick held that defendant showed good cause for an in camera review of the records.

> "Here, defendant's version of events is plausible given the factual scenario described in defense counsel's declaration. The declaration asserted that the officers mistook defendant for the person who actually discarded the cocaine, and falsely accused him of having done so. The scenario described in defense counsel's declaration is internally consistent; it conflicts with the police report only in denying that defendant possessed any cocaine and that he was the one who discarded the rocks of cocaine found on the ground. Those denials form the basis of a defense to the charge of possessing cocaine for sale. Thus, defendant has outlined a defense raising the issue of the practice of the arresting officers to make false arrests, plant evidence, commit perjury, and falsify police reports or probable cause. [Citations.] Defendant has established the relevance of such information to his pending trial [citation], and having advanced a basis for admitting it into evidence at trial, he has shown its materiality." (*Warrick, supra*, 35 Cal.4th at p. 1027.)

In contrast, *Thompson* involved a *Pitchess* motion which failed to satisfy even the very low threshold required for good cause to permit in camera review. In that case, the defendant was arrested for selling drugs to an undercover officer and receiving marked money in exchange. The defendant filed a *Pitchess* motion for disclosure of the records of all the officers involved in the undercover transaction. (*Thompson, supra,* 141 Cal.App.4th at pp. 1315, 1317.) Defense counsel's supporting declaration stated that "'the officers did not recover any buy money from the defendant, nor did the defendant offer and sell drugs to the undercover officer,'" the officers "'saw defendant and arrested him because he was in an area where they were doing arrests,'" when "'defendant was stopped by the police and once they realized he had a prior criminal history they fabricated the alleged events and used narcotics already in their possession and attributed these drugs to the defendant,'" and the charges were "'a fabrication manufactured by the officers to avoid any type of liability for their mishandling of the situation and to punish

the defendant for being in the wrong area, at the wrong time and for having a prior criminal history.'" (Id. at p. 1317.)

Thompson held the trial court properly denied the *Pitchess* motion and refused to conduct an in camera review of records because defendant failed to set forth good cause.

> "[Defendant's] showing is insufficient because it is not internally consistent or complete. We do not reject [defendant's] explanation because it lacked credibility, but *because it does not present a factual account of the scope of the alleged police misconduct, and does not explain his own actions in a manner that adequately supports his defense*. [Defendant], through counsel, denied he was in possession of cocaine or received $10 from [an officer]. But he does not state a nonculpable explanation for his presence in an area where drugs were being sold, sufficiently present a factual basis for being singled out by the police, or assert any 'mishandling of the situation' prior to his detention and arrest. Counsel's declaration simply denied the elements of the offense charged." (*Thompson, supra*, 141 Cal.App.4th at p. 1317, italics added.)

Thompson noted that the defendant in *Warrick* "did not merely make bald assertions that denied the elements of the charged crime. He provided an alternate version of the events that was plausible, if not entirely convincing. The defendant [in *Warrick*] presented a 'specific factual scenario' that explained his presence in the area, his running from the police, and a reason for the police to conclude that he had discarded the rock cocaine they recovered. And the scenario supplied, at least by inference, an explanation for the cocaine being on the ground, namely that others had discarded it to avoid arrest." (*Thompson, supra*, 141 Cal.App.4th at p. 1318.)

In contrast, the defendant in *Thompson* failed to "provide an alternate version of the facts regarding his presence and his actions prior to and at the time of his arrest. He does not explain the facts set forth in the police report. In essence, his declaration claims that the entire incident was fabricated and, by inference, that the police officers conspired to do so in advance. [The defendant] is not asserting that officers planted evidence and falsified a police report. He is asserting that, because he was standing at a particular location, 11 police officers conspired to plant narcotics and recorded money in his

possession, and to fabricate virtually all the events preceding and following his arrest. The officers were not called upon to exaggerate or forget certain facts, or make assertions based on assumptions and inferences. The officers agreed to completely misrepresent what they saw and heard as percipient witnesses." (*Thompson, supra,* 141 Cal.App.4th at p. 1318.)

> "We are aware that Thompson need not present a factual scenario that is reasonably likely to have occurred or is persuasive or even credible. [Citation.] Further, we cannot conclude that Thompson's scenario is totally beyond the realm of possibility. Thompson's denials 'might or could have occurred' in the sense that virtually anything is possible. *Warrick* did not redefine the word 'plausible' as synonymous with 'possible,' and does not require an in camera review based on a showing that is merely imaginable or conceivable and, therefore, not patently impossible. *Warrick* permits courts to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations." (*Id.* at pp. 1318-1319.)

In the instant case, as in *Thompson*, appellant completely failed to present a plausible factual scenario to establish good cause for an in camera review of Hancock's records. Defense counsel's declaration did not present a factual account of the scope of the alleged misconduct, or explain appellant's own actions in a manner that would have establish some type of defense. Instead, defense counsel offered a general averment that Hancock did not find anything in appellant's pocket and denied the elements of the charged offense, i.e., that he did not possess a stabbing instrument. Appellant's motion and defense counsel's declaration failed to make any allegations about Hancock's conduct, why appellant was singled out by Hancock, or even broadly accuse the officers of fabricating the entire incident, an allegation generally made in *Thompson* that was still insufficient to meet the low threshold showing of good cause. The trial court did not abuse its discretion in denying the *Pitchess* motion and we need not conduct an in camera review of Hancock's personnel records.

II. Impeachment with prior armed robbery conviction.

Appellant next contends the court improperly permitted the prosecutor to impeach his trial testimony with the fact of his prior conviction for armed robbery. Appellant argues the court should have either excluded such impeachment or "sanitized" the nature of the offense to eliminate any references to being armed with a weapon.

A. Background.

Prior to trial, the prosecutor filed a motion in limine to impeach appellant's expected trial testimony with his 2003 conviction for armed robbery. Appellant argued his prior armed robbery conviction should be excluded as prejudicial or, in the alternative, the court should sanitize the prior to only describe it as an offense of moral turpitude.

At a pretrial hearing, appellant argued his trial testimony should not be impeached by the fact of his prior robbery conviction since the evidence was extremely prejudicial: "[I]f they hear armed robbery, then this is a weapon case, that they might try to say well, this guy you know, really likes weapons," and the jury would rely upon the prior conviction to convict him "just because he has a prior armed robbery and this is a weapons case."

The prosecutor replied the case was "going to be all about credibility," appellant would likely testify he was set up by correctional officers, he told "a great big whale tale to Officer Hart shortly after the incident," and there was "nothing more relevant in this case" than appellant's credibility. The prosecutor further argued that armed robbery with a handgun was a serious offense of moral turpitude and showed "a greater willingness to do evil or readiness to do evil."

The court denied appellant's motion to exclude or sanitize the prior conviction:

> "Robbery committed with the use of a firearm is different than possessing a weapon in a state prison, non-firearm, a stabbing weapon in a state prison. So the crimes are not so similar as to cause the jury to believe, well, if he did it the time before, he probably did it this time.… [T]he prior is not

> distant in time and it is a crime of moral turpitude and sanitizing the prior in this case, the facts do not rise to the level that the prior should be sanitized. ... I believe sanitization is case driven and it certainly is appropriate when there is similarities in the matters of the crimes that might unduly influence the jury, but because these are, in the Court's judgment, different crimes, it would be inappropriate to sanitize and the request of the defense is denied."

B. Analysis.

A witness's credibility, including that of a defendant who elects to testify, may be impeached by evidence of a prior felony conviction which "necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty." (*People v. Castro* (1985) 38 Cal.3d 301, 306 (*Castro*); *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091.) Moral turpitude is defined as the "'readiness to do evil'" and does not depend on dishonesty being an element of the crime. (*Castro*, *supra*, 38 Cal.3d at pp. 314-315; *People v. Feaster*, *supra*, 102 Cal.App.4th at p. 1091.)

The admission of a prior felony conviction of moral turpitude, to impeach a defendant's trial testimony is subject to the court's exercise of discretion under Evidence Code section 352. (*People v. Green* (1995) 34 Cal.App.4th 165, 182.) In exercising that discretion, the court is *guided – but not bound – by* the following factors: whether the prior conviction reflects adversely on the witness's honesty or veracity, its nearness or remoteness in time, its similarity to the present offense, and the potential effect on the defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 653; *People v. Green*, *supra*, 34 Cal.App.4th at p. 182.)[8] The court's ruling is reviewed for abuse of discretion, that is, whether the court exceeded the bounds of reason. (*People v. Clair*, *supra*, 2 Cal.4th at p. 655.)

"The California Supreme Court has divided crimes of moral turpitude into two groups. [Citation.] The first group includes crimes in which dishonesty is an element

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[8] The last factor has no application in the instant case since appellant took the stand and admitted the prior conviction. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 926.)

(i.e., fraud, perjury, etc.). The second group includes crimes that indicate a '"general readiness to do evil,"' from which a readiness to lie can be inferred. [Citation.] Crimes in the latter group are acts of 'baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [Citation.] 'Although the inference is not as compelling in the latter case, "it is undeniable that a witness's moral depravity of any kind has some 'tendency in reason' [citation] to shake one's confidence in his honesty."' [Citation.]" (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28-29.)

"California courts have repeatedly held that prior convictions for burglary, robbery, and other various theft-related crimes are probative on the issue of the defendant's credibility. [Citations.]" (*People v. Mendoza, supra,* 78 Cal.App.4th at p. 925.) "[I]t is beyond dispute that robbery necessarily involves moral turpitude or the '"readiness to do evil,"' and evinces a character trait which can reasonably be characterized as '"immoral."' [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 64.) The added description of the offense as an armed robbery, based upon a firearm enhancement, further categorizes the offense as one of moral turpitude. (See, e.g., *People v. Cavazos* (1985) 172 Cal.App.3d 589, 595.)

Appellant's prior armed robbery conviction was admissible to impeach his trial testimony because it was an offense of moral turpitude, extremely relevant, and probative as to appellant's credibility and veracity. "No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity." (*People v. Beagle* (1972) 6 Cal.3d 441, 453; *People v. Hinton* (2006) 37 Cal.4th 839, 888.) The offense was not remote since it occurred in 2003, and it did not bear any similarities to the conduct charged in the instant case, that of an inmate in possession of a sharpened weapon. Moreover, the trial court properly found that appellant's credibility was the

critical issue in this case, given the dramatic disparity between the officers's testimony, and appellant's description of the incident and his claim about subsequent events.

In addition, the court did not abuse its discretion when it denied appellant's motion to "sanitize" the underlying nature of the prior conviction. A trial court may exercise its discretion to sanitize the descriptions of prior convictions where the nature of the unsanitized prior convictions would be more prejudicial than probative of the witness's credibility. (*Castro, supra,* 38 Cal.3d at pp. 305-306, 319; *People v. Massey* (1987) 192 Cal.App.3d 819, 825.) Sanitizing prior convictions is typically reserved for cases in which the impeaching offenses are similar to the current charges, said similarity rendering them more prejudicial than probative. (See, e.g., *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 464, fn. 2.) But sanitization of a prior felony conviction properly admitted for impeachment purposes is an exceptional step for a trial court to take. In *People v. Rollo* (1977) 20 Cal.3d 109 (partially superseded by statute as stated in *Castro, supra,* at pp. 306-313), the court described sanitizing a prior conviction as giving the defendant the "archetypal Hobson's choice of (1) remaining silent on the point and subjecting himself to ... improper speculation by the jury, or (2) divulging the nature of his prior conviction and incurring an equally grave risk that the jury will draw an impermissible inference of guilt. Either way leads to prejudice." (*People v. Rollo, supra,* 20 Cal.3d at p. 120.) Based upon the nature of the charged offense, the jury herein obviously knew appellant was already serving a state prison term. While appellant insisted that "sanitizing" the prior conviction would have been less prejudicial, the jury might have drawn the contrary inference and speculated on the severity of appellant's criminal record. (See, e.g., *People v. Massey, supra,* 192 Cal.App.3d 819, 825.)

Finally, even if the court erroneously permitted impeachment, any error is necessarily harmless since it is not reasonably probable he would have received a more favorable result if the impeachment evidence had been excluded or sanitized. (Evid.Code, § 353; *People v. Watson* (1956) 46 Cal.2d 818, 836; *Castro, supra,* 38

Cal.3d at p. 319.) The prior conviction was relevant and probative of appellant's credibility. But aside from impeachment on that point, appellant's credibility was completely undermined by his internally inconsistent trial testimony. Appellant testified he did not possess the stabbing instrument introduced into evidence, and insisted he had no reason to possess a weapon because he did not have any enemies in prison, he was not affiliated with any gangs, and he was not trying to move from the cell tier to the SAP to avoid problems with other inmates.

Appellant's credibility on these issues was dealt a serious blow by the tape-recording of his telephone call to his brother. Among other things, he told his brother that he was trying to get into the SAP to get away from inmates who threaten to stab him over their unpaid debts, and that his fellow gang "homies" warned him. Appellant's nonsensical explanations of his telephone statements further eroded his credibility. For example, appellant testified that "P's and B's" meant the prison gangs of "Pirus and Bloods", but claimed his telephone reference to the "P's and B's" meant "position and boundaries. P stands for proper planning, preventing poor performance. B, when I was telling my brother beautifully bold, brilliantly black." He further testified that his brother's references to gang terms were actually to "Swahili" words. Indeed, impeaching appellant's testimony with his prior conviction was a fairly minor matter compared to the impact of his contradictory statements on the tape recording.

We thus conclude the trial court did not abuse its discretion in permitting impeachment, and any error is necessarily harmless given the erosion of appellant's credibility in the course of his trial testimony.

III. Imposition of the upper term.

Appellant argues the court improperly imposed the upper term based on factors not found true by the jury in violation of *Cunningham*, that it made factual findings unsupported by the record, and that it followed the amended sentencing scheme which violated constitutional ex post facto principles.

A. Background.

The probation report stated appellant's juvenile record began in February 2000, with a petition for unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), and appellant was placed on probation. In April 2000, another juvenile petition was found true for another violation of the same offense; he was again placed on probation but in a camp placement. In December 2000, a third juvenile petition was found true for falsely reporting a crime to an officer (§ 148.5, subd. (a)), and he was continued in his camp placement.

In March 2003, appellant was charged and subsequently convicted as an adult of armed robbery (§ 211) with a firearm enhancement (§ 12022.53, subd. (b)); appellant and his accomplice placed handguns against the neck and ribs of a pizza delivery man, and stole his cellphone and money. He was sentenced to 13 years in state prison and was serving this sentence when he committed the instant offense.

The probation report listed two aggravating circumstances: appellant's prior sustained juvenile petitions were numerous and his prior performance on juvenile probation was unsatisfactory because he reoffended. There were no mitigating circumstances. The probation report recommended the midterm because the aggravating circumstances were not "of sufficient weight to justify the upper term."

At the sentencing hearing, the prosecutor argued a third aggravating factor was that appellant testified falsely at trial, primarily based upon the inconsistencies between his testimony and the tape-recorded telephone call. The prosecutor asserted:

> "He indicated that he had no fear whatsoever of being stabbed, that he had no enemies in prison and of course the very beginning of the audio recording was discussion between [appellant] and apparently his brother indicating that he did have enemies in prison, that they owed him money and intended to stab him when he was out of Administrative Segregation."

The court agreed with the prosecutor that appellant's false trial testimony was another aggravating circumstance, and it was "abundantly clear" that appellant "testified

falsely under oath to the jury." The court explained: "[Appellant] is a very intelligent person ... I mean he made a very presentable witness but his testimony was impeached for the reasons that [the prosecutor] indicated [regarding the telephone conversation] and he did perjure himself on the stand in the Court's opinion." "[Appellant] took the stand in the court's judgment, testified falsely, that creates additional circumstances in aggravation."

The court agreed with the probation report about the aggravating circumstances that appellant's prior sustained juvenile petitions were numerous, and his prior performance on juvenile probation was not satisfactory. The court continued:

> "If those are the factors then I'm inclined to agree that the probation office's recommendation [for the midterm] was appropriate *but when you take those circumstances in aggravation and add to those the fact that [appellant] took the stand in the court's judgment, testified falsely, that creates additional circumstances in aggravation.*" (Italics added.)

The court found the upper term was appropriate because there were aggravating factors and no mitigating factors. The court imposed the upper term of four years, doubled to eight years pursuant to the second strike, to be served fully consecutive to the term he was already serving, for a total fixed term of 21 years.

B. Analysis.

Appellant asserts the court improperly imposed the upper term in violation of *Cunningham*. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington* (2004) 542 U.S. 296, 303, the court applied *Apprendi* to invalidate a state court sentence and explained the "'statutory maximum'" is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In *Cunningham*, the court applied *Apprendi* and *Blakely* to California's then existing determinate sentencing law (former § 1170, subd. (b)), which provided "'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.'" (*Cunningham*, *supra*, 549 U.S. at p. 277.) *Cunningham* held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Id.* at p. 274.)

In response to *Cunningham*, the Legislature remedied the constitutional infirmities by amending section 1170 by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3, § 2; *People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2 (*Sandoval*).) The amended section 1170 now states in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.... The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected." (§ 1170, subd. (b).)

In *Sandoval*, the court judicially reformed the former sentencing law to conform to the amended statute, and held that imposition of sentence under the reformations would not violate the prohibition on ex post facto laws. (*Sandoval*, *supra*, 41 Cal.4th at pp. 845-847, 852, 857.) Thus, the amended sentencing scheme permits the court to impose an upper term based on facts not found by a jury and not found beyond a reasonable doubt.

> "Accordingly, so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those

circumstances have been found to be true by a jury." (*People v. Black* (2007) 41 Cal.4th 799, 813, italics in original.)

In the instant case, appellant was sentenced in April 2008, after the amendment of the sentencing law. The court stated reasons for imposing the upper term and the court's sentencing ruling complies with the requirements of the amended section 1170, subdivision (b). Therefore, there is no federal constitutional violation under *Cunningham*.

Appellant contends that application of the amended sentencing scheme to his case violated constitutional principles of ex post facto since the former law was in effect when he committed the instant offense. *Sandoval* rejected a similar ex post facto contention. (*Sandoval*, *supra*, 41 Cal.4th at pp. 853-854, 857; see also *Butler v. Curry* (9th Cir. 2008) 528 F.3d 624, 652, fn. 20.) Appellant acknowledges *Sandoval* but contends it was wrongly decided. We are bound by the Supreme Court's holding in that case, agree with the court's analysis, and note appellant's objections. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant next contends the court relied upon an impermissible factor to impose the upper term when it discussed appellant's inconsistent trial testimony. Appellant does not challenge the two aggravating factors cited by the probation report, and acknowledges that a single aggravating factor may support the upper term. Instead, appellant asserts that even if the court could make factual findings under *Sandoval* and the amended sentencing law, the court clearly stated that it imposed the upper term based upon the third aggravating factor of appellant's trial perjury. Appellant contends the court could not impose the upper term based upon a legal finding that he committed the criminal offense of perjury.

"A trial court's conclusion that a defendant has committed perjury may be considered as one fact to be considered in fixing punishment as it bears on defendant's character and prospects for rehabilitation. [Citation.]" (*People v. Redmond* (1981) 29

Cal.3d 904, 913.) "The commission of perjury is of obvious relevance in this regard, because it reflects on a defendant's criminal history, on [the defendant's] willingness to accept the commands of the law and the authority of the court, and on [the defendant's] character in general." (*United States v. Dunnigan* (1993) 507 U.S. 87, 94 (*Dunnigan*).)

In *People v. Howard* (1993) 17 Cal.App.4th 999 (*Howard*), the court held that "when imposing an aggravated sentence because of perjury at trial, the sentencing judge is constitutionally required to make on-the-record findings encompassing all the elements of a perjury violation. In California, those elements are a willful statement, under oath, of any material matter which the witness knows to be false. [Citation.]" (*Id.* at p. 1004.) *Howard*'s ruling was based upon *Dunnigan*, where the United States Supreme Court explained:

> "[A]n accused may give inaccurate testimony due to confusion, mistake, or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress, or self-defense. Her testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent. For these reasons, if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out. [Citations.] When doing so, it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding. The district court's determination that enhancement is required is sufficient, however, if, as was the case here, the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury. [Citation.] Given the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken, there is ample support for the District Court's finding." (*Dunnigan, supra,* 507 U.S. at pp. 95-96.)

Howard relied upon *Dunnigan* and determined that perjury findings are constitutionally required and not merely a function of the federal sentencing rules, because "the requirement of findings provides protection against violation of the right to testify, which 'does not include a right to commit perjury.' [Citation.] An adequate

explanation by the sentencing judge, sufficient to ensure against a constitutional violation, will indicate that the enhancement is properly based on untruthfulness." (*Howard, supra,* 17 Cal.App.4th at p. 1004.) *Howard* warned against imposition of an aggravated term simply because the jury's verdict indicated that it did not accept the defendant's testimony: "The routine use of perjury as an aggravating factor in such cases would violate due process by chilling the defendant's constitutional right to testify." (*Id.* at p. 1005.)

While the trial court in *Howard* did not make express findings encompassing all the elements of perjury, *Howard* found the constitutional error harmless beyond a reasonable doubt since it was clear that the defendant did not give "inaccurate testimony 'due to confusion, mistake or faulty memory.'" (*Howard, supra,* 17 Cal.App.4th at p. 1005.) *Howard* found the sole issue for the jury was whether the defendant or the complaining witness was telling the truth, and the trial court correctly observed that in convicting the defendant, the jury "necessarily decided he was the liar." (*Ibid*.) *Howard* concluded:

> "The [trial] court's own conclusion that there was perjury likewise could only have been based on a finding that [the defendant] had been untruthful. There was no other basis for rejecting his testimony. [¶] Consequently, despite the absence of the findings prescribed by *Dunnigan,* the record provides adequate assurance that there was no violation of the constitutional right to testify--i.e., that the court's reliance on perjury as an aggravating factor was properly based on untruthfulness." (*Howard, supra,* 17 Cal.App.4th at p. 1005.)

In the instant case, as in *Howard,* the trial court did not make express findings encompassing all the elements of perjury. Moreover, appellant did not object to the court's reliance upon his untruthfulness as an aggravating factor. (See *People v. Middleton* (1997) 52 Cal.App.4th 19, 35-37 [defendant waived claim of error based on *Howard* and *Dunnigan* because he failed to object to trial court's reliance on his

perceived trial perjury to impose consecutive sentences], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.)

Even if appellant has not waived this claim, however, any error in the court's reliance on this ground as an aggravating factor is necessarily harmless beyond a reasonable doubt because the trial court's reliance on appellant's commission of perjury on the witness stand, as an aggravating circumstance, could only have been based on appellant's untruthfulness. Officers Hancock and Morales testified about appellant's suspicious behavior when they entered the cell tier and the discovery of the heating element and the sharpened weapon inside the hidden pocket of his shorts, they denied using any physical violence against him, and they denied removing him from administrative segregation the next day to offer a deal in exchange for dismissing the charge. In contrast, appellant testified that he was simply going about his business in the cell tier when the ISU officers entered, Hancock slammed him against the dayroom table, the officers removed the heating element and a Bic pen from his hidden pocket, he insisted he did not possess the sharpened object introduced as an exhibit at trial, and that the officers removed him from administrative segregation and offered to dismiss the charge if he provided them with information. Appellant also insisted he had no enemies in prison, he was not affiliated or a member of any gang, and he was not trying to get into the SAP to avoid any enemies; as we have already explained, these claims were completely undermined by his telephone conversation with his brother.

The trial testimony herein presented two mutually exclusive scenarios: either appellant possessed the sharpened weapon when he was searched or he simply possessed an innocuous Bic pen. As in *Howard*, the jury herein "necessarily decided he was the liar." (*Howard, supra*, 17 Cal.App.4th at p. 1005.) Also as in *Howard*, appellant's constitutional right to testify was not violated because the trial court's conclusion at the sentencing hearing could only have been based on a finding that appellant was untruthful. It was clear that appellant did not give "inaccurate testimony 'due to confusion, mistake

or faulty memory,'" and there was no other basis for rejecting this testimony. (*Howard, supra,* 17 Cal.App.4th at p. 1005.)

We thus conclude the court's imposition of the upper term did not violate *Cunningham* or constitutional principles against ex post facto laws, and the court's reliance upon appellant's untruthfulness at trial, without making specific findings as to the elements of perjury, was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

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HILL, J.

WE CONCUR:

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ARDAIZ, P.J.

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DAWSON, J.